No. 3751

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

YOUNG YEN and YOUNG SOON,
Appellees.

BRIEF FOR APPELLEES.

GEO. A. McGOWAN,
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These two appellees sought to enter the United States as citizens thereof, they being the foreign born sons of a native born citizen of the United States. In support of their applications to enter this country they presented the testimony of their father and identifying witness, and their own testimony, which was all corroborated by the existence of departure and arrival records in the Immigration service showing the father was in China at a time necessary for him to become the parent of these appellees, and also verified the different trips of the father and the witness showing them to have been in

China at the time stated and making it possible to have seen and be able to identify them. The testimony as presented was singularly clear and free from discrepancies. The examining inspector, in his abstract of record and report, notes "some resemblance between applicant Young Soon and his father, but none between the applicant Young Yen and the father". He further states that the demeanor of all witnesses during the examination was satisfactory.

The reason for the adverse finding was the fact that it is claimed that the father made a statement in 1897 that he was not married, which contradicts the statement made in the present case. The father made a visit to China after 1897, and these two appellees were both born years after the alleged statement that the father was not married is claimed to have been made. When the father returned to the United States from the visit to China upon which these two appellees were begotten he was not asked by the Immigration authorities whether he was married; he was refused a landing and his case was thereafter taken into the United States District Court where, after due and proper hearing, he was found to be a citizen of the United States, and was readmitted into the United States as such.

While it is true that upon the father's return from China upon this, the essential trip with respect to the paternity of these appellees, he was not asked whether or not he was married he was, however,

asked his name, and it appears that he gave two names, one of which is his milk, or baby, name, and the other of which is his marriage name, thus indicating that he was married, even though the exact question was not asked him. It is to be remembered that among the Chinese they have a clearly defined system of names; upon the birth of the child he is given his babyhood, or milk name, and upon his marriage he is given his marriage name. Thus it is when a Chinese person is asked his names, if he gives two names, it shows that he is a married person, he having given his milk, or baby name, and his marriage name.

The order of denial before the local Immigration office was appealed from to the Secretary of Labor and there the excluding decision was affirmed. Both the denial by the port officials and the denial by the Department at Washington were predicated solely and exclusively upon the supposed prior declaration of the father in 1897, when he returned to this country, when it appears that he stated that he was not married.

It was successfully urged in the court below upon behalf of these appellees that the testimony and evidence presented before the Immigration authorities was of such a conclusive kind and character that to disregard the same was an abuse of official discretion. Accordingly the demurrer of the Commissioner was overruled and the writ was directed to issue, and upon the hearing of the return thereto

the court found in favor of the appellees and discharged them from custody as citizens of the United States. From this order the Government has perfected this appeal.

Argument.

The appellant has made a number of assignment of errors and seeks to divide this case into a number of different questions. As to the appellees it is felt that the case involves but one question, and that is whether or not the evidence was of such a conclusive kind and character as to constitute an official abuse of discretion in refusing to be guided by it. That was the view taken and urged by the then petitioners before the lower court and was the point sustained by the lower court in deciding these cases in their favor, and in the view of appellees the only point presented for determination before this court.

The latest announcement of the law upon this point is contained in the recent decision by the Supreme Court of the United States in the case of *Kwock Jan Fat v. White* (40 S. Ct. R. 566), wherein on pages 567 and 568 it is held as follows:

> "(2) It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was not

fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law,' Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 681, 682, 32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States, 208 U. S. 8, 12, 28; Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218."

Whereas the court further states on page 570, as follows:

"(4) The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

The foregoing decision was before Judge Dooling and considered by him in this case, as indeed it was

in another case recently decided, wherein the prior declaration as to whether the father was single or married was involved, the case being that of *Tam You Lin,* No. 17295, and the records of the lower court wherein it was held by the lower court:

> "The arguments addressed to the court as to the effect of the alleged father's prior declarations that he was not married, might well be and indeed were addressed to the Immigration Department. Notwithstanding such arguments the Department ruled against the petitioner on the facts. Such ruling, in the absence of every exceptional circumstance, binds the court."

In the case of the said *Tam You Lin* the court did not find the exceptional circumstances which it felt would give the lower court jurisdiction, whereas in the present case the court did find "those very exceptional circumstances" which the lower court felt gave it jurisdiction in the premises and resulted in the order of discharge now being considered.

Now in the present case the said decision in the *Kwock Jan Fat* case is doubly applicable. By referring to the record in the present case it is frankly admitted and conceded by the government that, save for one circumstance, the evidence is legally of such a character that to disregard it would be an abuse of official discretion and render the hearing before the Immigration Service unfair, and hence give this court jurisdiction to proceed and determine the case upon its merits.

The one circumstance hereinbefore adverted to is the fact that when the father, Young Fai, reentered

the United States as incoming passenger No. 58, ex SS. "Doric", during the month of April, 1897, he was subjected to what appears to have been a very short examination. The imperfection in the method of reporting this examination is most apparent; in fact, the applicant does not even seem to have been asked his name. The heading of his examination sheet shows his name, class and place of birth, which presumably was taken from the manifest. Whether the applicant had any other names was not asked of him. There were but seven questions in this examination and the last question and answer alleged to have been given by him is as follows:

> "Q. How long did he stay there?
> A. My uncle went home to China Q. S. 18 (1892). *I am not married.* I have no brothers or sisters."

It will be noted that the question addressed to the father referred to his uncle, and the first part of his answer refers to his uncle, while the last two parts seem to refer to the applicant. It is admitted that the last part does refer to the applicant, as he has neither brothers or sisters, but it may well be that the translation "I am not married", had reference to the uncle and not to the applicant. This for the reason that the uncle Young Dong, was apparently single. The father testified on March 7th, 1921, with respect to this uncle that he did not know whether that uncle was married or not. He did know that his uncle, Young Gooey, was married, but Young Dong is the uncle about whom he testified in

1897 when he stated that an uncle went home to China Q. S. 18 (1892). It will be noted that in the present case the father disclaims having stated in 1897 that he was not married. It may well be that that was a mistake in the translation or in the way the unrecorded question was asked of the applicant, so that the applicant's answer, though probably referring to this uncle Young Dong as not being married was recorded as referring to himself. This examination was through the medium of a Chinese interpreter and it may be that the question being addressed about the uncle that the marriage feature of it also referred to the uncle in the mind of the party being questioned, while the interpreter had in his mind the applicant.

According to the present claims of the father he was married when he returned to this country in April, 1897, notwithstanding the declaration that he was not married. The father claims to have been the father of two children older than these present applicants. Those two older sons since came to the United States and tried to land, but were denied admission because of this adverse declaration of the father, which was rigidly held against him as an "estoppel". It is frankly conceded that there was very great and strong merit in the cases of the first set of these two boys, and that there was a very strong resemblance between at least one of them and the father, yet, because of this prior adverse declaration being then regarded as an absolute estoppel,

the appeals were both dismissed and the then applicants returned to China.

These two present applicants are, however, younger brothers, born long after April, 1897, when this declaration was made, and hence in all fairness should not be bound by it. That the Immigration Officers erred in the earlier cases by holding this prior declaration as an absolute estoppel which prevented the father from claiming that he was in fact married at that time is now frankly admitted by the Immigration Service, and such prior declarations are not now considered as an absolute estoppel. The ruling setting forth the prevailing rule of evidence is contained in the decision of the Department in the case of *Chang Wo,* No. 54005/4-1 (No. 14390/11-20) decided September 14, 1915, wherein it was held as follows:

> "This case, like that of Lim Hung Sam, (54004/31) is referred to me by the Acting Secretary (before whom it came originally) because it involves the Department's policy relating to misstatements by alleged fathers at prior examinations. In the present case as in the other case the applicant is confronted with a prior statement of his alleged father, which, if true, makes it impossible for applicant to be a son of the person here claiming to be his father. As I have stated in the Lim Hung Sam case, it is not the policy of the Department to regard these prior statements as estoppels. When, as in both these cases, the father has testified years ago that he was then unmarried, and now testifies to being the father of an applicant born before his prior testimony, he is not precluded from showing that he was in fact married at the time he

swore he was unmarried. While his prior testimony is a fact to be considered in arriving at a conclusion it is not an absolute bar to the admission of his alleged son (53560/116).

"Therefore, if the applicant in this case has shown that his alleged father was married at the time of his father's prior testimony to the contrary, and that their relationship is as asserted, he is entitled to admission. This, I think, he has done.

"Appeal sustained.

Louis F. Post, Asst. Sec'y."

The contention of American born Chinese which caused them to make these former statements which were inconsistent with their later declarations was that during the period of the latter 1890s and the early 1900s, they claimed that there was a well grounded belief in the minds of the Chinese that in the cases of American born Chinese boys who had been living in China, and were seeking to re-enter the United States as citizens thereof, that to admit they were married, and particularly long prior to their return, and that they had a family of foreign born children, would be considered by the Customs or Immigration authorities as circumstances tending to show that they had by so establishing a foreign home and family ties, abandoned their right of residence in the United States, and thus terminated their citizenship. Printed Decision No. 36 of the Department of Commerce and Labor, V. H. Metcalfe, Secretary, dated July 6, 1904, contains in almost its concluding part, what the Chinese have contended was substantially the position of the Cus-

toms and Immigration authorities during the time in question. The extract follows:

> "Without assigning further reasons the Department dismisses the appeal, although it believes that such a case, where a child is born of alien parents already having an offspring in their own home abroad, and leaving shortly after the birth of such child for a permanent residence in their own home, and where the child so born in the United States waits until he is 26 years of age, establishes himself in his own country, marries before he attempts to claim his birthright, is not within the reasoning upon which the Supreme Court reaches its decision in the Wong Kim Ark Case."

The explanation made by American born Chinese with respect to these examples to prior inconsistent testimony has usually taken the line that they believed that if they admitted they were married, and particularly if they admitted they were married long prior to their returning to the United States, and that during the interim they had established a separate residence and raised a numerous family, that such facts and circumstances would be considered as evidence that they had, as a conclusion of law, abandoned their American citizenship by establishing a foreign domicile, and particularly by numerous home ties. These explanations were naturally predicted upon the admission that the former adverse declarations were at the time they were made probably "self-serving". In Assistant Secretary Post's decision in the Chang Wo case, supra, he says, with respect to such matters:

> " * * * As I have stated in the Lim Hung Sam case, it is not the policy of the department to regard these prior statements as estoppels. * * * While his prior testimony is a fact to be considered in arriving at a conclusion, it is not an absolute bar to the admission of his alleged son."

The Supreme Court in the Kwong Jan Fat case has laid down the ruling that it is incumbent upon the immigration officials to maintain a proper record of their hearings. The original statement taken from the father of these boys in April, 1897, cannot be said to measure up to this requirement. It apparently consists of just seven questions, the last one being:

> "Q. How long did you stay there?
> A. My uncle went home to China Q. S. 18 (1892). *I am not married.* I have no brothers or sisters."

It is apparent that this answer is not responsive to the question, that it contains much more than was brought out by the interpreter in answer to a line of questions that have been omitted entirely from the record. That the father was in point of fact married at that time is evidenced by the fact that when he was next examined before the Immigration Office he gives two names, one of which is his "Milk", or baby name, and the other his marriage name.

These two appellees were born as the result of a subsequent trip to China years after the one upon which the detrimental statement in question is

claimed to have been made by the father, and it is certainly felt that it is a wrong value to place upon such a questionable rule of evidence as to still regard this old statement of 1897 as an absolute estoppel which cannot be overcome when the rights of subsequently born children are at stake.

The point made is that such Chinese applicants for admission at that time labored under the belief that to admit that they were married and had children in China would be to work a forfeiture of their American citizenship, and hence, acting under the compulsion of this belief these native born citizens denied the fact that they were married and that they had children when returning to this country. They felt that they were compelled to do this because to admit the truth, that is, that they were married and had a wife and children, would prevent their re-entry. The fact that the father was a married man is indicated that upon the first occasion that he was thereafter questioned by the Immigration authorities it develops that he used both the "Milk" and the "Married" name. There is no contention that he ever married in this country; that he could not have done so without its being a matter of official record and hence capable of proof. The marriage name could only have come from the prior existing marriage.

The Department has in a long, long line of cases, both prior to and since the *Chang Wo* decision hereinbefore referred to, admitted the existence of this erroneous belief in the minds of native born citi-

zens returning to the country of their nativity, and in the present case we feel it was an official abuse of discretion to hold this former statement as a direct estoppel which could not be overcome even in the cases of children born long subsequently thereto.

I am not unmindful of the fact that the father in the present case making the prior declaration that he was not married, but this denial is undoubtedly prompted by the overwhelming consciousness of the fact that he is the father of these two appellees, and he could not bring himself to admit that he had denied the existence of his wife and children. It undoubtedly and unquestionably is the fact that at the time in question the father was laboring under the mistaken belief that to admit the existence of a wife and children would work a forfeiture of his American citizenship, and hence if he did so it was for that reason, he denied their existence.

The Department has for years recognized the former existence of this mistaken idea upon the part of Chinese citizens and quite uniformly made allowance therefore. It is only now that with the change of administration and new officers in charge of these administrative functions they, probably not being familiar with these past circumstances, have taken up these prior declarations and held to them with a rigidity that places them in the class of being an absolute estoppel, thus precluding a fair consideration of the main issue, which is whether or not the father was, in point of fact, married and the father of these appellees, and substituting therefor the col-

lateral issue as to whether or not the father made the prior declaration attributed to him to the effect that he was not married and had no children. Approaching the matter in this view it is felt by counsel, and was felt by the court below that the considerations of this case before the Departmental officers have not been fair. The decision of the Supreme Court in the case of *Kwock Jan Fat*, supra, is of controlling force in this case. That Supreme Court stated in that case:

> " * * * It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

I feel that the general principles therein enunciated should prevail and control in this case.

Dated, San Francisco,
October 22, 1921.

Respectfully submitted,

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